SIS FORUM (MALAYSIA) & ORS v. JAWATANKUASA FATWA NEGERI SELANGOR & ORS

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
ABDUL RAHMAN SEBLI JCA
ZALEHA YUSOF JCA
[CIVIL APPEAL NO: W-01(A)-277-08-2016]
24 APRIL 2018

CIVIL PROCEDURE: *Res judicata – Decision – Finality of earlier decision – Preliminary objection raised during leave stage dismissed – Case taken over by another judge and preliminary objection raised again was allowed – Whether second judge correct in reversing decision of first judge – Whether principle of res judicata applied*

CIVIL PROCEDURE: *Jurisdiction – Concurrent jurisdiction – Preliminary objection raised during leave stage dismissed – Case taken over by another judge and preliminary objection raised again was allowed – Whether second judge correct in reversing decision of first judge – Whether court of co-ordinate jurisdiction has power to override decision of another court of co-ordinate jurisdiction*

The respondents issue a *fatwa* directed at the first appellant, declaring it contravening the teachings of Islam ('the *fatwa*'). The first appellant wrote to the first and second respondents, seeking clarification on the said *fatwa* but neither replied. The appellants subsequently commenced leave application for judicial review to declare that the *fatwa* contravened the Federal Constitution. The respondents raised a preliminary objection that the High Court had no jurisdiction to hear the matter as it was within the jurisdiction of the Syariah Court. Asmabi Mohamad J, who heard the application, dismissed the preliminary objection and ordered for the case to be heard on the merits. Before the substantive application could be heard by Asmabi Mohamad J, the conduct of the case was taken over by Hanipah Farikullah J. The respondents raised the same preliminary objection again and this time, it was allowed on the grounds that (i) the doctrine of *res judicata* did not apply against the respondents as they were not represented during the leave proceedings; (ii) the Federal Court, in *Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor* ('*Kijal Resort*'), decided that the respondents in judicial review proceedings, could raise preliminary objections during the hearing proper; and (iii) the civil courts have no jurisdiction to hear the application as the subject matter was a *fatwa*. Hence, the present appeal. The issue that arose was whether Hanipah Farikullah J was right in reversing the decision of Asmabi Mohamad J on the preliminary objection raised by the respondents.

Held (allowing appeal)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) The reliance on *Kijal Resort* was misconceived. It was not the authority for Hanipah Farikullah J to justify the decision to re-open the issue of jurisdiction, which Asmabi Mohamad J had decided, against the respondents at the leave stage of hearing. The issue was *res judicata*. The decision effectively meant that the High Court had rendered two inconsistent and irreconcilable decisions on the same matter in the same proceedings involving the same parties. A court of co-ordinate jurisdiction has no power to override the decision of another court of co-ordinate jurisdiction. Hanipah Farikullah J was not at liberty to do so. The case was ordered to be reverted to the High Court to be heard on the merits by a different judge. (paras 16 & 22-24)

Bahasa Malaysia *Headnotes*

Responden-responden telah mengeluarkan fatwa terhadap perayu pertama, mengisytiharkannya menyeleweng daripada landasan ajaran Islam ('fatwa'). Perayu-perayu menulis kepada responden pertama dan kedua, memohon penjelasan tentang fatwa tersebut tetapi kedua-duanya tidak membalas. Perayu-perayu seterusnya memulakan permohonan kebenaran semakan kehakiman untuk mengisytiharkan fatwa tersebut bertentangan dengan Perlembagaan Persekutuan. Responden-responden membangkitkan bantahan awalan bahawa Mahkamah Tinggi tidak berbidang kuasa mendengar hal perkara ini kerana hal perkara ini dalam bidang kuasa Mahkamah Syariah. Asmabi Mohamad H, yang mendengar permohonan tersebut, menolak bantahan awalan dan memerintahkan agar kes didengar berdasarkan merit. Sebelum permohonan substantif didengar oleh Asmabi Mohamad H, pengendalian kes diambil alih oleh Hanipah Farikullah H. Responden-responden, sekali lagi, membangkitkan bantahan awalan yang sama dan kali ini, bantahan awalan dibenarkan atas alasan (i) doktrin *res judicata* tidak terpakai terhadap responden-responden kerana mereka tidak diwakili semasa prosiding kebenaran; (ii) Mahkamah Persekutuan, dalam *Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor* ('*Kijal Resort*'), memutuskan responden-responden dalam prosiding semakan kehakiman, boleh membangkitkan bantahan awalan semasa perbicaraan sebenar; dan (iii) mahkamah sivil tidak berbidang kuasa mendengar permohonan tersebut kerana hal perkaranya adalah fatwa. Maka timbul rayuan ini. Isu yang timbul adalah sama ada Hanipah Farikullah H bertindak betul dalam mengakas keputusan Asmabi Mohamad H tentang bantahan awalan yang dibangkitkan oleh responden-responden.

Diputuskan (membenarkan rayuan)
Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Sandaran pada *Kijal Resort* adalah satu salah tanggapan. Kes tersebut bukanlah nas bagi Hanipah Farikullah H untuk dijadikan alasan membuka semula isu bidang kuasa, yang telah diputuskan oleh Asmabi Mohamad H, terhadap responden-responden pada peringkat kebenaran pendengaran. Isu tersebut *res judicata*. Kesan keputusan tersebut, Mahkamah Tinggi telah mengeluarkan dua keputusan yang bercanggah dan bertentangan tentang hal perkara yang sama dalam prosiding yang sama melibatkan pihak-pihak yang sama. Mahkamah dengan bidang kuasa setara tidak mempunyai kuasa menolak keputusan satu lagi mahkamah yang mempunyai bidang kuasa setara. Hanipah Farikullah H tidak bebas berbuat demikian. Kes diperintahkan agar dikembalikan ke Mahkamah Tinggi untuk didengar berdasarkan merit oleh hakim lain.

Case(s) referred to:
Government of Malaysia v. Dato' Chong Kok Lim [1973] 1 LNS 35 HC ***(refd)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***
Jabatan Agama Islam Wilayah Persekutuan & Ors v. Berjaya Books Sdn Bhd & Ors [2015] 3 CLJ 461 CA ***(dist)***
Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor [2015] 3 CLJ 861 FC ***(refd)***
Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases [2009] 2 CLJ 54 FC ***(refd)***

Legislation referred to:
Administration of the Religion of Islam (State of Selangor) 2003, s. 51
Communications and Multimedia Act 1998, s. 3(3)
Federal Constitution, arts. 10, 11, 74, Ninth Schedule List 1, 2
Printing Presses and Publications Act 1984, s. 7

For the appellants - Fahri Azzat, Surendra Ananth & Farhan Haziq; M/s Fahri & Co
For the 1st & 3rd respondents - Nik Suhaimi Nik Sulaiman & Naziah Mokhtar; State Legal Advisor's Office
For the 2nd respondent - Yusfarizal Yusoff & Majdah Muda; M/s Muda

[Editor's note: For the High Court judgment, please see SIS Forum (Malaysia) & Ors v. Jawatankuasa Fatwa Negeri Selangor & Ors [2016] 1 LNS 1364 (overruled).]

Reported by Najib Tamby

JUDGMENT

Abdul Rahman Sebli JCA:

[1] This appeal was against the decision of the Kuala Lumpur High Court allowing the respondents' preliminary objection that the High Court had no jurisdiction to hear the appellants' application for judicial review.

[2] The subject matter of the judicial review was *fatwa* number MAIS/SU/BUU/01-2/002/2013-3(4) ("the fatwa"). The appellants' complaint essentially was that the *fatwa* contravenes the Federal Constitution.

[3] The *fatwa* was as follows:

> **Fatwa Pemikiran Liberalisme Dan Pluralisme Agama**
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> SIS Forum (Malaysia) dan mana-mana individu, pertubuhan, atau institusi yang berpegang kepada fahaman liberalisme dan pluralisme agama adalah sesat dan menyeleweng daripada ajaran Islam.
>
> Mana-mana bahan terbitan yang berunsur pemikiran-pemikiran fahaman liberalisme dan pluralisme agama hendaklah diharamkan dan boleh dirampas.
>
> Suruhanjaya Komunikasi dan Multimedia Malaysia (SKMM) hendaklah menyekat laman-laman sosial yang bertentangan dengan ajaran Islam dan Hukum Syarak.
>
> Mana-mana individu yang berpegang kepada fahaman liberalisme dan pluralisme agama hendaklah bertaubat dan kembali ke jalan Islam.

[4] The *fatwa* was directed at the first appellant, a company registered under the Companies Act 1965. As the *fatwa* directly affected the first appellant, the first appellant by way of letter dated 28 October 2014 wrote to the second respondent to seek clarification on:

(i) the reason behind the labeling of the first appellant as "sesat dan menyeleweng daripada ajaran Islam";

(ii) the definition of the phrase "fahaman liberal dan pluralisme"; and

(iii) whether the *fatwa* was issued after taking into account the procedure set out in s. 51 of the Administration of the Religion of Islam (State of Selangor) 2003 ("the ARI").

[5] The first appellant sent a separate letter dated 30 October 2014 to the first respondent with similar contents. However, neither the first nor the second respondent replied to either letter.

[6] On 31 October 2014, the appellants filed for judicial review to obtain leave to commence judicial review proceedings for the following reliefs:

1. A declaration that the *fatwa*:
    a. to the extent that it implicitly provides for an offence in relation to "newspapers; publications; publishers; printing and printing presses" is contrary to s. 7 of the Printing Presses and Publications Act 1984.

b. to the extent that it directs the Malaysian Communications and Multimedia Commission, incidentally a federal agency, to block social websites, is contrary to s. 3(3) of the Communications and Multimedia Act 1998;

c. to the extent it involves matters of national interest, the same is contrary to s. 51 of the ARI for not following the process set out therein; and

d. is in excess of arts. 10, 11, 74 and List 1 and 2 of the Ninth Schedule to the Federal Constitution where it purports to criminalise the right of individuals, associations and as the case may be to hold liberal ideas and religious pluralism; ban and instructing the seizure of publications containing liberal ideas and religious pluralism; restricting free speech and expression where it relates to liberal ideas and religious pluralism; and restricting free speech and expression on social websites contrary to the teachings of Islam and religious law; all of which are not matters which can be legislated by it;

2. A declaration that the first appellant, being a "company limited by guarantee" or any other party not able to profess the religion of Islam cannot be subject to the respondents' decision as the respondents' jurisdiction is only over persons professing the religion of Islam; and

3. For consequential relief in the form of *certiorari* to bring the decision of the respondents by way of *fatwa* in the High Court and for the same to be quashed.

[7] The leave application was heard by Asmabi J (as she then was). At the hearing, the respondents raised a preliminary objection that the High Court had no jurisdiction to hear the matter as it was within the jurisdiction of the Syariah Court. Having heard arguments, the learned judge dismissed the respondents' preliminary objection and ordered for the case to be heard on the merits.

[8] But before the substantive application could be heard by Asmabi J, the conduct of the case was taken over by another judge, namely Hanipah Farikullah J. At the substantive application, the respondents again raised the same preliminary objection that the High Court had no jurisdiction to hear the matter as it was within the jurisdiction of the Syariah Court.

[9] Hanipah Farikullah J acceded to the respondents' argument and dismissed the appellants' review application without hearing the merits of the matter, contrary to what Asmabi J had decided earlier, that the application was to be heard on the merits. The learned judge gave the following reasons for upholding the preliminary objection raised by the respondents:

(i) the doctrine of *res judicata* did not apply against the respondents as they were not represented during the leave proceedings;

(ii) the Federal Court in *Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor* [2015] 3 CLJ 861; [2016] 1 MLJ 544 decided that the respondents in judicial review proceedings can raise preliminary objections during the hearing proper;

(iii) the civil courts have no jurisdiction to hear the application as the subject matter of the application was a fatwa. It would be inappropriate for the civil courts to determine the validity of the *fatwa* as it is an issue concerning Islamic law and doctrine.

[10] The issue before us was whether Hanipah Farikullah J was right in reversing the decision of Asmabi J on the preliminary objection raised by the respondents.

[11] The facts are similar to the facts in *Jabatan Agama Islam Wilayah Persekutuan & Ors v. Berjaya Books Sdn Bhd & Ors* [2015] 3 CLJ 461; [2015] 3 MLJ 65 where this Court held that the High Court could not change its mind and overrule its own decision and to subsequently hold that it did not have jurisdiction to hear the judicial review application.

[12] In another decision of this court in *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104; [1996] 2 MLJ 57, Gopal Sri Ram JCA (as he then was) made the following observations at p. 113 (CLJ); pp. 65-66 (MLJ):

> But, as we have earlier said, we choose to decide this appeal on quite a different basis. It is this. The learned judge, on 13 October 1993, was faced with an objection as to the form of proceedings which had been adopted by the appellants. He came to the conclusion that the form chosen by the appellants was not irregular. Although that was a decision made on an interlocutory matter which was purely procedural in nature it was nevertheless binding on the court and on all parties to the *lis* until its reversal on appeal. **In our judgment the decision of the learned judge overruling the respondent's preliminary objection rendered the point taken *res judicata*.** (emphasis added)

[13] In arriving at this conclusion, this court endorsed the decision of the High Court in *Government of Malaysia v. Dato' Chong Kok Lim* [1973] 1 LNS 35; [1973] 2 MLJ 74 where Sharma J said at p. 76:

> In *Satyadhyan Ghosel & Ors v. Sint Deorajin Dobi and Another* AIR 1960 SC 941, the statement of law on the subject is given thus:
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> > The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter – whether on a

> question of fact or a question of law – has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party is allowed in a future suit or proceeding between the same parties to canvas the matter again. This principle of *res judicata* is embodied in relation to suits in s. 11 of the Code of Civil Procedure; but even where s. 11 does not apply, the principle of *res judicata* has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.
>
> *The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.*
>
> A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (See *Peareth v. Marriot* (1883) 22 Ch D 182, *Hook v. Administrator-General of Bengal & Ors* LR 48 IA 187 and *Re Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v. Tan Yew Ghee and Another* [1936] MLJ 141 at pp 147-151). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication. (See *Louis Dreyfus v. Aruna Chalayya* LR 58 LA 381. (emphasis added)

[14] In deciding the way she did, Hanipah Farikullah J was apprised of the decision of the Federal Court in *Sulaiman bin Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases* [2009] 2 CLJ 54; [2009] 6 MLJ 354 where Abdul Hamid Mohamad CJ said at p. 71 (CLJ); p. 370 (MLJ):

> It is true that there is no provision for the *fatwa* to be laid before the TSLA. But, in the case of a fatwa, the offence is created by s. 10 of the SCOT itself. TSLA may at any time repeal s. 10 of the SCOT or even s. 51 of the AIRA, or, for that matter both the Enactments. It is not that the TSLA is powerless. **Besides, if the gazetted fatwa covers a matter falling outside the limit provided by the Constitution, it is clearly open to challenge in the court of law, as in this case.** For a *fatwa* to have force of law and for s. 10 of the SCOT to operate, it must be one that falls within the limits set by the Constitution. That is the limit. (emphasis added)

[15] The learned judge however relied on the Federal Court case of *Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor* [2015] 3 CLJ 861; [2016] 1 MLJ 544 to support her proposition that the doctrine of *res judicata* did not apply against the respondents.

[16] We agree with the appellants that the learned judge's reliance on *Kijal Resort* is misconceived. It is clear that in that case, the preliminary objection raised by the respondent at the substantive hearing was not raised by the Attorney-General's Chambers during the leave stage, unlike the present case where the preliminary objection was raised at the leave stage.

[17] The fact that the learned judge ruled against the respondents on the issue of jurisdiction provides enough proof that the objection was indeed raised. In para. 12 of their undated written submissions, the first and third respondents repeated the argument they raised before Hanipah Farikullah J that since they were not represented at the leave stage, *res judicata* did not apply against them.

[18] We did not think this would make any difference, as the preliminary objection was raised and the objection was considered and dismissed by the learned judge. In any event, not all was lost for the first and third respondents. They could still raise the issue on appeal to this court after the review application had been finally determined on the merits by the High Court.

[19] A decision had been made that the High Court had jurisdiction to hear the judicial review application. The respondents elected not to appeal against the decision. What the respondents should have done under the circumstances was to abide by the decision instead of making a fresh application before a different judge.

[20] In *Kijal Resort,* it is obvious that the High Court did not deal with the preliminary objection at all at the leave stage. This is clear from the following observations by Ramly Ali FCJ delivering the judgment of the court at p. 881 (CLJ); p. 565 (MLJ):

> Apparently from the notes of proceedings and the grounds of judgment, the High Court did not deal with the two preliminary points at all; instead it proceeded to hear substantive submissions on the application for judicial review and on 21 June 2009 dismissed the application with costs on merit of the substantive issues. The learned High Court judge did not mention anything about the two preliminary objections raised by the second respondent in his grounds of judgment.

[21] The issue before the Federal Court was whether the respondents had waived their right to raise the preliminary objection as they had failed to do so during the leave stage. Ramly Ali FCJ said at p. 896 (CLJ); p. 581 (MLJ):

> Question 5 and Question 6 relate to the appellant's complaint that preliminary objections by the respondents should not be made at the hearing of the appeal at the Court of Appeal when leave to commence judicial review had been granted and the substantive judicial review application had been disposed of by the High Court. The appellant argued

that the preliminary objections should have been raised at the leave stage at the High Court and the respondents are barred and estopped from raising such preliminary objections. The appellant further contended that the first respondent had conceded to such leave being granted by the High Court; and therefore are deemed to have waived its rights to make any preliminary objection in the Court of Appeal.

[22] *Kijal Resort* is therefore not authority for the learned judge to justify her decision to re-open the issue of jurisdiction which Asmabi J had decided against the respondents at the leave stage of the hearing. The issue was *res judicata*. With due respect to the learned judge, her decision effectively means that the High Court had rendered two inconsistent and irreconcilable decisions on the same matter in the same proceedings involving the same parties.

[23] It is trite law that a court of co-ordinate jurisdiction has no power to override the decision of another court of co-ordinate jurisdiction. Clearly, the learned judge was not at liberty to do so. What she should have done was to proceed to hear the application on the merits.

[24] It was for this reason that we unanimously allowed the appellants' appeal and ordered for the case to be reverted to the High Court to be heard on the merits by a different judge.